Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1998

DONALD GASTINEAU,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

Donald Gastineau
1025 Mesa Drive
Camarillo, California 93010
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28pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State's conduct of forcibly taking a blood test violated the Fourth Amendment in the following particulars: (a) Defendant was not advised of his right to choose the test used to determine blood alcohol content; and (b) excessive force was used.

2. Whether the State's forcible extraction of blood violated the Due Process Clause of the Fifth Amendment.

3. Whether Vehicle Code 2800 is unconstitutionally vague.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The February 3, 1999 opinion of the Supreme Court of California is reprinted in Appendix A.

The opinion of the Court of Appeal, State of California, Second Appellate District, is reprinted in Appendix B.

The November 18, 1998 opinion of the Superior Court of the State of California, County of Ventura, Appellate Department, concerning petitioner's motion to vacate the opinion and order a rehearing is reprinted in Appendix C.

The October 26, 1998 Opinion and Judgment of the Superior Court of the State of California, County of Ventura, Appellate Department, is reprinted in Appendix D.

JURISDICTION

The opinion of the Supreme Court of California denying the Petition for Review is dated February 3, 1999. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the decisions below pursuant to 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves application of the following statutes.

California Vehicle Code Section 23152

(a) It is unlawful for any person who is under the

influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

California Vehicle Code Section 2800

It is unlawful to willfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, when that peace officer is in uniform and is performing duties under any of the provisions of this code, or to refuse to submit to any lawful inspection under this code.

California Vehicle Code Section 2800.1

(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor... .

STATEMENT OF THE CASE

On December 29, 1997, at about 8:30 pm, Ventura County Deputy Sheriff Brian Sliva ("Sliva") initiated a traffic stop on Defendant because the license plate light of Defendant's car had burned out. Because the two lane roads were either marked "NO PARKING AT ANY TIME" or winding with no parking capability until Defendant was within sight of his home,

Defendant drove about two miles before pulling over in his driveway. While looking for a place to pull over, Defendant obeyed all traffic laws and physically acknowledged to Deputy Sliva that he was aware of Sliva's presence. The arresting officer did not provide any testimony concerning Defendant's driving performance.

Defendant was arrested for DUI and transported to St. John's Pleasant Valley Hospital where a blood sample was forcibly drawn. The Defendant was handcuffed and restrained by three deputy sheriffs applying pressure to his hands, arms, and shoulders to obtain the sample. The "Medical Record of Blood Specimen Drawn at Request of Peace Officer" prepared by the Registered Nurse performing the forced blood draw expressly confirms that Defendant was handcuffed during the blood draw, three deputies used force to obtain the blood draw, and it took numerous attempts with the needle before the blood draw was completed.

Defendant's contemporaneous affidavit of the events stated that: "[T]wo of the deputies behind the defendant's back were torturing him by twisting his fingers beneath the handcuffs almost to the breaking point to force him to remain static while the blood was being drawn."

Defendant also testified during the trial of this matter that one deputy virtually twisted off a finger on each of his hands while the blood sample was being taken. A Sergeant from the Sheriff's office testified that this force was required to forcibly obtain the blood sample. The blood sample showed a 0.15% blood alcohol content. Of course, at the time of the initial arrest, the results of the forced blood draw were not available, and therefore no evidence at the time of arrest to sustain the

charge.

It is disputed, however, whether the deputies ever informed the Defendant of his right to take a urine or breath test. The Hospital Medical Record of Blood Specimen Drawn discloses no consent signature. Deputy Sliva and another deputy testified that Sliva advised Defendant that he had to provide a "chemical" test. Deputy Sliva testified that he asked Defendant whether he would submit to a blood, breath, or urine test. The Defendant testified he was never asked to submit to a breath or urine test, nor advised that he could do so.

Defendant was charged with: Count One, DUI, in violation of Vehicle Code Section 23152(a); Count Two, Driving While Having a 0.08 or Higher Blood Alcohol, in violation of Vehicle Code Section 23152(b); and Count Three, Evading Officer, in violation of Vehicle Code Section 2800.1. Property receipts and a bail/fine receipt were entered on the trial court record.

On March 3, 1998, Defendant filed his Motion for Suppression of Evidence and to Dismiss the Fleeing Police Charge arguing, as is relevant here, that: the forcible blood sample was violative of the Fourth Amendment because the Defendant was not advised of his right to take urine or breath tests and violative of the Fourth and Fifth Amendments because excessive force was used; and that Vehicle Code 2800.1 was unconstitutionally vague.

Trial began on March 12, 1998. The complaint was amended adding Count 4, Disobedience to Officer, in violation of Vehicle Code Section 2800. After trial, Count Three was dismissed on a motion from the State. Defendant was convicted of Counts One, Two, and Four.

On March 13, 1998, Defendant was sentenced to 108 days in jail (90 days for the conviction and 18 days in lieu of the fine at Defendant's request). The court granted OR bail pending appeal.

Defendant appealed to the Appellate Department of the Superior Court. On October 26, 1998, the Opinion and Judgment of the Appellate Department was entered in favor of the Plaintiff-Appellee affirming the judgment of the trial court. The Opinion and Judgment was served on Defendant on October 26, 1998.

Defendant timely petitioned the Appellate Department for rehearing of the Opinion and Judgment, pursuant to Rule 107 of the California Rules of Court. Defendant further requested a certification of the instant case to this Court, pursuant to Rule 63 of the California Rules of Court, in the event rehearing was denied or upon rehearing the decision of the Superior Court Appellate Division was adverse to him. Defendant's Application for Certification was made on the ground that transfer was necessary to settle important questions of law.

The Appellate Department of the Superior Court denied Defendant's Petition For Rehearing, and it denied his Application For Certification to the Court of Appeal, Second Appellate District, Division 6, on November 18, 1998. Petitioner was served the Appellate Department's Order On Petition For Rehearing on November 18, 1998, which was sent by United States mail to his address.

Defendant timely filed a Petition for Review to the Court of Appeal, Second Appellate District, Division Six. That petition was denied on December 23, 1998.

Defendant timely filed a Petition for Review to the Supreme Court of California. That petition was denied on February 3, 1999.

Petitioner timely files this Petition for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS IMPROPERLY FAILED TO CONSIDER CREDIBLE EVIDENCE SUBMITTED BY DEFENDANT DURING THE TRIAL OF THIS MATTER

The Appellate Department of Superior Court stated in its Opinion and Judgment that: "Appellant contends that he was not given a chemical test advisement. The trier of fact found that the appellant was given the advisement. Appellant argues that the arresting officer's testimony was impeached and not credible. As a reviewing court we can not reweigh issues of credibility. Such factual determinations are to be determined by the trier of fact. The trial judge, as the trier of fact, was the exclusive judge of credibility of witnesses and the weight to be given their testimony. When the testimony is not inherently improbable the judgment must be affirmed. (Cite omitted). We find nothing in the record before us to indicate that the trial court's findings were inherently improbable. Our review of the record shows the findings of the trial court were well supported by the evidence."

The record on appeal clearly disclosed that it was disputed whether the deputies ever informed the Defendant of his right to take a urine or breath test. Deputy Sliva and another deputy testified that Sliva advised Defendant that he had to provide a

"chemical" test. Deputy Sliva testified that he asked Defendant whether he would submit to a blood, breath, or urine test. The Defendant testified he was never asked to submit to a breath or urine test, nor advised that he could do so.

The trial court erroneously determined that Deputy Sliva gave unimpeached testimony that he gave Defendant the opportunity to give a blood, breath, or urine sample and that Defendant chose not to. Yet, Deputy Sliva never gave Defendant such a choice. Further, the testimony was impeached on several levels. Defendant's Motion for Suppression of Evidence with Memorandum and Affidavit, accepted as Defendant's testimony, specifically stated that Defendant was never asked to submit to a breath or urine test. Further, the deputies' testimony supports Defendant's testimony.

> A When we were at the ER, we advised the hospital staff that we were there to take blood. They gave us a small room in which we can go and sit and wait for them to take the blood.
>
> And while we were there, I again advised him about the California law about him needing to submit to a test, at which time he again refused. Nurse Keaton came in to draw the blood.
>
> Q Did you advise the defendant that if he didn't give it that it could be taken against his will?
>
> A Yes.
>
> Q Did he have any kind of response to that?

A Yeah. He said we didn't have the right to take his blood.

* * *

Q Can you tell us what happened when you got to the hospital?

A The defendant was advised of his obligation to provide a chemical test. He refused. Deputy Sliva advised him that he basically has to give us a chemical test. If he wished not to, then blood was going to be drawn.

Q So it was a forced blood draw?

The entire conversation refers either to chemical tests, a test, or blood, and took place after the deputies informed the hospital that a blood sample was required. Indeed, the sole purpose of going to the hospital was to obtain a blood sample. Given the testimony, it is clear that Defendant was not advised at the hospital of his right of choice. Even on cross-examination, Defendant was only asked whether he was advised that he would have to submit to "chemical tests." Even though Defendant's responses were that Deputy Sliva asked him to sign a consent form to take blood and asked him if he was going to permit the drawing of blood, the prosecutor did not ask any questions specific to urine or breath samples.

The only testimony contrary to Defendant's that he was not asked to submit either a blood, breath, or urine sample was testimony from Deputy Sliva that he inquired at the traffic stop if Defendant would do so. Interestingly, however, Deputy Sliva

classified the advisement given at the traffic stop as the same as that given at the hospital. Considering all the evidence, the trial court's determination that Defendant was advised of his right of choice was erroneous.

It must further be noted that Defendant's Affidavit attached to his Memorandum was: (1) the only evidence at trial which covered the entire episode, (2) sworn to be true evidence by one of only two material witnesses to the entire chain of events, (3) written from memory, typed, and notarized within ten (10) days of the occurrence, compared to sketchy notes by the arresting officer, answering only questions the prosecutor posed to favor his case some three (3) months after the events at issue, (4) precisely chronological and describes only those facts of which the arresting officer and Defendant were well aware at that time, (5) packed with evidence of exceeded authority of the arresting officer in his zeal to make his case for the arrest after the fact, (6) not challenged by questions from the prosecution, was not impugned, and stands as prima facie evidence of the facts contained therein, (7) indicating the arrest was a typical take down; the arresting officer applied handcuffs within seconds of arriving on Defendant's property; and thus it was not possible to conduct field sobriety tests as the officer claimed, (8) prima facie evidence that the arrest was unwarranted, because the only charge to warrant the arrest was later dropped, as the prosecution (with the assistance of the trial court) could not prove intent, (9) evidence that Defendant was arrested after all three officers knew he lived there, that his car was duly licensed at that address, and that it was properly insured, and (10) evidence that due to any and all of the above exceeded authorities, Defendant was falsely arrested, falsely charged and incarcerated, and the trial court erred in not dismissing all charges.

II. THE LOWER COURTS ERRED BY FINDING THAT FORCIBLE EXTRACTION OF BLOOD DOES NOT VIOLATE DUE PROCESS OF LAW

The Appellate Division of Superior Court stated in its Opinion and Judgment that: "[A]ppellant contends that the forcible extraction of blood violated the due process clause of the Fifth Amendment. Appellant's argument is without merit. It is well settled that reasonable force to withdraw blood, incident to an arrest, does not violate an individual's due process and Fourth Amendment protection." Based on the facts of this matter, this is an erroneous conclusion. The Court continued: "The evidence before the trial court showed that appellant resisted having a blood sample by jumping up and down on the balls of his feet. From the record before us, the arresting officers used only the degree of force which was necessary to overcome appellant's resistance." A continuation of this rationale would mean that no degree of force is unnecessary as long as the end result is the forcible extraction of blood. In other words, the ends justify the means without limitation.

It is not reasonable to apply extreme pressure on the fingers of a person who is handcuffed in order to draw a blood sample from his forearm. The probability of injury from breaking the fingers is far greater than that from employing other, more obvious restraints, such as grabbing the wrists. Twisting of the fingers by the arresting officers can only be seen as inflicting physical punishment for refusal to submit to the orders of the deputies. This conduct is even more outrageous considering that the deputies' conduct was not in accordance with law, as discussed above.

The outrageous act of the infliction of physical pain for personal, unjustifiable reasons during the taking of Defendant's blood sample was violative of the Fourth Amendment. This Court must reverse the lower courts' decisions not to suppress the use of the blood sample and any evidence derived therefrom.

In rejecting the claim that coerced blood sampling violated the due process clause, the Supreme Court warned that "it would be a different case if the police ... responded to resistance with inappropriate force." *Schmerber v. California*, 384 U.S. 757, 760 n. 4 (1966). Indeed, within the precepts of due process "strong arm" behavior by the police cannot be tolerated. *People v. Kraft*, 3 Cal.App.3d 890, 899, 84 Cal.Rptr. 280 (3rd App. 1970) (reversing conviction for drunk driving where blood sample obtained from "defensive" defendant by "aggressive beyond all need" officers).

Because excessive force was used, the officer's conduct violated due process of law and the blood sample and all evidence derived therefrom must be suppressed.

III. THE LOWER COURTS ERRED BY FINDING THAT THE VEHICLE CODE SECTION 2800 IS NOT CONSTITUTIONALLY VAGUE

The Appellate Division of Superior Court stated in its Opinion and Judgment that: "Appellant's argument that Vehicle Code section 2800 is constitutionally vague misinterprets and misrepresents the correct principles governing constitutional vagueness." The Court's conclusion is erroneous.

A statute is constitutionally infirm by reason of being vague

when its prohibitions are not clearly defined, or if it does not provide explicit standards for its enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Pliscou v. Holtville Unified School Dist.*, 411 F.Supp. 842, 850 (S.D. Cal. 1976).

The vagueness doctrine applies, and a statute is unconstitutional, when it does not fairly inform a person of what is commanded or prohibited as violative of due process. The doctrine originates in the Due Process Clause of the Fourteenth Amendment, and the doctrine is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful. The doctrine requires that penal statutes give notice to ordinary persons of what is prohibited and provide definite standards to guide discretionary actions of police officers so as to prevent arbitrary and discriminatory law enforcement.

Section 2800 states in pertinent part:

> It is unlawful to willfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer . . . when that peace officer is in uniform and is performing duties under any of the provision of this code . . .

The law is vague because the trial court applied it to Defendant's conduct of driving to his home before pulling over. Nothing in the language of the statute, or any court case adjudicating the statute, implies that it is applicable to a failure to pull over upon seeing police lights or hearing a police siren.

Indeed, the statute's specific reference to the officer being in uniform indicates that the officer must give a personal (with

his body) "order, signal, or direction." This is the nature of the court adjudications of Section 2800: *People v. Norman*, 538 P.2d 237, 240, 14 Cal. 3d 929, 932, 123 Cal. Rptr. 109 (1975) (officer ordered defendant to "either drop it [a suspected weapon] or die"); *McCorkle v. City of Los Angeles*, 449 P.2d 453, 458, 70 Cal. 2d 252, 259, 74 Cal. Rptr. 389 (1969) (plaintiff ordered "come show me the skids" or "come show me the point of impact"); *The People v. Hicks*, 39 Cal. App. 49, 53, 46 Cal. Rptr. 2d 26, 28 (6th Ct. App. 1995) (defendant ordered to stand at a specified location); *The People v. Wohlleben*, 261 Cal. App. 2d 461, 465, 67 Cal. Rptr. 826, 829 (2nd Ct. App. 1968) (holding section applicable to failure to stop and submit to inspection); *The People v. Ritter*, 115 Cal. App. 3d Supp. 1, 2, 170 Cal. Rptr. 901, 902 (LA Dist. Ct. App. 1980) (defendant ordered to remain in vehicle).

Furthermore, Defendant could have no idea whether Deputy Sliva was wearing a uniform when, at night,[1] he turned on the flashing lights on his Sheriff's vehicle.

Finally, the conduct of fleeing or eluding a pursuing police officer's **motor vehicle** is prohibited by the very next statutory provision: Section 2800.1. The Court should not interpret the vague language of Section 2800 as encompassing the specific offense clearly prohibited by the very next statute.

Therefore, the statute is void for vagueness because it allows conviction by learned judges of the State of California for conduct not clearly prohibited by the language of the statute.

---

[1] The Court can take judicial notice it is night at 8:30 pm on December 29th.

The record on appeal also discloses that the lower courts never determined that Defendant's conduct was willful, as expressly required by the language of the statute. Without this element of the statute proven by the record, Defendant's conviction must be reversed.

CONCLUSION

The lower courts failed to consider that the trial court completely suppressed Defendant's testimony (Defendant's contemporaneous affidavit containing the chronology of events) from the engrossed settled statement of the trial transcript, and the *prima facie* evidence contained therein.

Because Defendant's convictions below were based upon the State's impermissible forced blood extraction and a vague statute, the Superior Court, Court of Appeal, and Supreme Court of California should have reversed and dismissed the cause below. The Court should issue a writ of certiorari to correct the conflict between the lower courts holdings and the general principles expressed in the decisions of this Court.

Further, because the lower courts decisions depart substantially from the relevant decisions of this Court requiring strict compliance with the due process and equal protection clauses of the Fourteenth Amendment, this Court should settle these important due process and equal protection questions.

Respectfully submitted,

Donald Gastineau
1025 Mesa Drive
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APPENDIX A

Second Appellate District, Division Six, No. B127526
S075708

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB - 3 1999
Robert Wandruff Clerk
Deputy

DONALD GASTINEAU, Petitioner

v.

VENTURA COUNTY SUPERIOR COURT, Respondent

THE PEOPLE, Real Party In Interest

Petition for review DENIED.

Mosk

Acting Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION: 6

December 23, 1998

Donald Gastineau

Petitioner

v.

Superior Court of Ventura County

Respondent

The People

Real Party in Interest

B127526
Ventura County No. 98S000151

THE COURT:

The petition for writ of Review is denied.

APPENDIX C

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS
FILED
NOV 18 1998
SHEILA GONZALEZ, Superior and Municipal
Courts Executive Officer and Clerk
BY:_____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs. CASE NO. 98S000151

ORDER ON PETITION FOR REHEARING

DONALD GASTINEAU,

Defendant/Appellant.

The Court having considered the appellant's request pursuant to California Rules of Court, Rule 107 and Rule 63 denies appellant's request for "Rehearing" and "Certification."

The Court finds no grounds in appellant's petition to grant a rehearing and the issues raised do not merit certification.

/s/
KEN W. RILEY
Judge of the Superior Court,
Appellate Department

/s/
VINCENT J. O'NEILL, Jr.
Presiding Judge of the Superior Court,
Appellate Department

/s/
DAVID W. LONG
Judge of the Superior Court,
Appellate Department

DATED: NOV 18 1998.

APPENDIX D

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS
FILED
OCT 26 1998
SHEILA GONZALEZ, Superior and Municipal
Courts Executive Officer and Clerk
BY: /s/_____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs. CASE NO. 98S000151

OPINION AND JUDGMENT

DONALD GASTINEAU,

Defendant/Appellant.

Appellant contends that he was not given a chemical test advisement. The trier of fact found that the appellant was given the advisement. Appellant argues that the arresting officer's testimony was impeached and not credible.

As a reviewing court we can not reweigh issues of credibility. Such factual determinations are to be determined by

the trier of fact. The trial judge, as the trier of fact, was the exclusive judge of credibility of witnesses and the weight to be given their testimony. When the testimony is not inherently improbable the judgment must be affirmed. (Witkin and Epstein, California Criminal Law (2d ed.) Appeal, sec. 3206.) *People v. Swanson* (1962) 204 Cal.App.2d 169. We find nothing in the record before us to indicate that the trial court's findings were inherently improbable. Our review of the record shows the findings of the trial court well supported by the evidence.

Additionally, appellant contends that the forcible extraction of blood violated the due process clause of the Fifth Amendment. Appellant's argument is without merit. It is well settled that reasonable force to withdraw blood, incident to an arrest, does not violate an individual's due process and Fourth Amendment protection. *Schmerber v. California* (1966) 384 U.S. 757; *People v. Pucinelli* (1976) 63 Cal.App.3d 742.

The evidence before the trial court showed that appellant resisted having a blood sample by jumping up and down on the balls of his feet. From the record before us, the arresting officers used only the degree of force which was necessary to overcome appellant's resistance. *Carleton v. Superior Court* (1985) 170 Cal.App.3d 1182, 1187.

Appellant's argument that Vehicle Code section 2800 is constitutionally vague misinterprets and misrepresents the correct principles governing constitutional vagueness.

The judgment is affirmed. The case is remanded to the trial court for appellant to be ordered to serve the stayed sentence.

/s/
KEN W. RILEY
Judge of the Superior Court,
Appellate Department

/s/
VINCENT J. O'NEILL, Jr.
Presiding Judge of the Superior Court,
Appellate Department

/s/
DAVID W. LONG
Judge of the Superior Court,
Appellate Department

DATED: OCT 26 1998.